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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 36

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A COPARTNERSHIP, PETITIONERS,

vs.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA, RESPONDENT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ AND BRIEF OF AMICI CURIÆ.

ROBERT A. LITTLETON,
JOHN C. ALTMAN,
ABRAHAM LOWENHAUPT,
STANLEY WAITE,
Counsel for Fred Medart Manufacturing Co., Pacific Porcelain Ware Co.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Fred Medart Manufacturing Company of St. Louis, Mo., and Pacific

Porcelain Ware Company of San Francisco, California, having cases pending involving identically the question involved in the above-entitled case, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiæ*.

ROBERT A. LITTLETON,
JOHN C. ALTMAN,
ABRAHAM LOWENHAUPT,
STANLEY WAITE,
Counsel for Fred Medart Manufacturing Co., Pacific Porcelain Ware Co.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIÆ.

Statement.

The case was tried before the District Court, for the Southern District of California, which decided in

favor of the petitioner (R. 15-19), upon a motion for judgment upon the stipulated facts. The Circuit Court of Appeals, in an opinion rendered November 4, 1929 (R. 36), and reported in 35 Fed. (2d) 586, reversed the decision of the District Court, on the ground that Section 611 of the Revenue Act of 1928, which had not been relied upon below, barred recovery by the petitioner. Certiorari was granted by this Court on March 3, 1930.

The facts are as follows: In 1920 the Commissioner of Internal Revenue assessed additional income taxes for the year 1917, and the taxpayer filed in the same year a claim to abate (that is, cancel) this assessment. This claim was pending until December 22, 1922, when the Commissioner denied it. During the interval after this disposition of the claim in 1922 and before March 22, 1923 (on which date the statute of limitation ran against collection by the Government), the Commissioner failed to collect. In 1924, the Government, disregarding the statute of limitations, forced the taxpayer to pay the assessment. The petitioner has sued herein to recover back the sum so paid under duress. The respondent contends that (in spite of the fact that the tax was collected after it was barred) Section 611, Revenue Act of 1928, prevents the taxpayer from recovering in this action. The petitioner contends that Section 611 has no such effect.

Provisions of Law.

The assessment of the tax involved in this case was made *during 1920* under the provisions of Section

9 (*a*) of the Revenue Act of 1916 (39 Stat. 756-77 c. 463), as amended by the Revenue Act of 1917 (40 Stat. 300-38, c. 63).

Section 9 (*a*) of the Revenue Acts of 1916 and 1917 *supra*, reads as follows:

> "That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said amounts shall be paid on or before the fifteenth day of June, except in cases of refusal or neglect of make such return and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, or has been made, make a return upon information obtained as provided for in this title or by existing law, or require the necessary corrections to be made, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the fifteenth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid, and interest at the rate of one per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons."

It will be observed that assessments made under the foregoing provision of law were summary in char-

acter. That is, no procedure was prescribed whereby the Commissioner was required to notify taxpayer that he was about to assess an additional tax against him. When such summary assessment was made, it was the duty of the Commissioner to proceed with the collection of same. However, there were general provisions of law, Section 3220, Revised Statutes, which authorized the Commissioner of Internal Revenue to *remit*, refund, and pay back to taxpayer all taxes erroneously or illegally assessed or collected.

Under said Section 3220, Revised Statutes, the Commissioner of Internal Revenue was authorized to receive from the taxpayer a claim for the *remission of such tax summarily assessed*, or for the *abatement* of such assessment before collection. Where assessment was seasonably made, there was no limitation on collection by distraint proceeding. Also, if no assessment was made within three years, any amount finally determined by the Commissioner to be due as a tax could be collected at any time by suit in court therefor. But in a case where assessment was seasonably made, it was optional with the Commissioner as to whether he should proceed to collect by distraint proceedings or suit in court.

In a case where a summary assessment was seasonably made the Commissioner of Internal Revenue adopted the policy of receiving from taxpayers claims for the remission or abatement of such tax and assessment, rather than enforcing payment by distraint, and then receiving a claim for refund or repayment of tax, if same be erroneously and illegally assessed and collected.

Under the foregoing procedure, the collection of a tax by distraint or proceeding in court was not *stayed* by the filing of a claim for remission or abatement; but, with the option of the Commissioner and Collector, were merely *delayed.*

The above procedure, as briefly outlined, is historical in the collection of the revenues of the Government prior to the date of the passage of the Revenue Act of 1918 (40 Stat. 1057-96 c 18).

Section 9 (*a*) of the Revenue Act of 1917, *supra,* also provides that the tax shown to be due on returns filed by taxpayers for the taxable year 1917, shall be *assessed* on or before the first day of June of each successive year, and the taxpayer notified of the amount of said assessment which was payable on or before the 15th day of June. Section 1009 of the Revenue Act of 1917 gave the taxpayer the right to make an estimate of his tax liability at the time return was filed, and pay said estimated tax in installments; and upon subsequent determination and assessment by the Commissioner of *actual tax due,* any amount overpaid by taxpayer under said estimate would be refunded. The assessment that the Commissioner ultimately made was original and not a *deficiency assessment.* "All assessments" which would include any "deficiency assessment" were required to be made within three years after the return was filed; except in cases of refusal or neglect to make such return, or in cases of erroneous, false, or fraudulent returns, in which cases, upon discovery thereof, assessment could be made at any time (Section 14 (*a*) of the Revenue Act of 1917, *supra*).

Section 250 of the Revenue Act of 1918 established an entirely new procedure for the collection of taxes imposed thereby. Said Section, paragraph (*d*), for the first time in the history of the Government, prescribed a limitation on collection as well as assessment of taxes. The limitations thus prescribed were five years from the date the return was filed or was due. Those limitations ran concurrently (*Bowers* vs. *New York and Albany Lighterage Co.*, 373 U. S. 346 *et seq.*). In returns prepared for taxpayers under the Revenue Act of 1918, there was contained "a notice and demand" for immediate payment of tax shown to be due thereon. That is, in filing a return there was contemporaneously with such event, an assessment of the tax shown to be due thereon, which could be paid in one lump sum or by four equal installments.

Section 250 (*a*) of the Revenue Act of 1918 provides:

> "That except as otherwise provided in this section and sections 221 and 237 the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after the time fixed by law for filing the return.
>
> "The tax may at the option of the taxpayer be paid in a single payment instead of in installments, in which case the total amount shall be paid on or before the time fixed by law for filing

> the return, or, where an extension of time for filing the return has been granted, on or before the expiration of the period of such extension."

Within five years after the filing of returns by taxpayers under the Revenue Act of 1918 the Commissioner *was required* to make an examination thereof and *determine* and assess any additional tax found to to be due; and *no suit* or *proceeding* for the collection of *any tax* shall be begun after the expiration of said five years from *date return was due or was filed.*

Section 250 (*d*) of the Revenue Act of 1918 provides:

> "Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under *any* return shall be determined and assessed by the Commissioner within five years after the *return was due or was made,* and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due." (Italics ours.)

There were no instructions contained in the Revenue Act of 1918, in reference to how the Commissioner should proceed in the examination of returns filed under that Act. It was evidently thought by Congress that when the Commissioner was given a period of five years to do a thing, he would devise such machinery as would fit the frame, and that no undue hardship

would result either to the taxpayer or the Commissioner. Under the provisions of Section 250 (*d*) of the Revenue Act of 1918 the Commissioner could perhaps continue to make *summary* assessments if he desired to stimulate the taxpayer to action, or if any danger in reference to insolvency or departure from the country of the taxpayer was imminent, which might jeopardize collection. In case of such summary assessment of an alleged deficiency, the Commissioner could still employ the general provisions of law (Section 3220 of Revised Statutes) to remit, abate or refund any part of said summary assessment ultimately found not to be due. However, the expiration of the statute of limitation on collection was not a danger in reference to the tax that could be *stayed* by assessment, and filing of a claim for remission and abatement. When such bar fell, whether before or after assessment, it operated to put an end to the liability of the taxpayer for any additional tax.

If Section 250 (*d*) of the Revenue Act of 1918 had not been repealed by Section 250 (*d*) of the Revenue Act of 1921 (42 Stat. 227, c 136), no provision for the extension of the five year period for assessment and collection would have been provided for, and the expiration of the limitations on assessment and collection would have put an end to the tax (*United States* vs. *Russell*, 278 U. S. 181).

The assessment and collection of taxes for the year 1917 and prior years were not affected by the provisions of Section 250 of the Revenue Act of 1918. Taxes for those years were assessable and collectible under the provisions of law imposing them.

Section 250 of the Revenue Act of 1921, *supra*, passed *November 23, 1921*, is a general provision for the determination, assessment and collection of taxes, no matter whether imposed by that Act or prior Acts, providing for internal revenues of the Government.

Section 250 (*d*) of the Revenue Act of 1921, *supra*, provides as follows:

> "SEC. 250 (*d*) The amount of income, excess-profits, or war profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided*, That in the case of income received during the lifetime of a decedent,

all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: *Provided further*, That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due; *Provided further*, That in cases coming within the scope of paragraph (9) of subdivision (*a*) of section 214, or of paragraph (8) of subdivision (*a*) of section 234, or in cases of final settlement of losses and other deductions tentatively allowed by the Commissioner pending a determination of the exact amount deductible, the amount of tax or deficiency in tax due may be determined, assessed, and collected at any time; but prior to the assessment thereof the taxpayer shall be notified and given a period of not less than thirty days in which to file an appeal and be heard as hereinafter provided in this subdivision."

The effect of Section 250 of the Revenue Act of 1921 is that all internal revenue taxes imposed by the Act of August 5, 1909 (36 Stat. 113-18, c. 6), (excise tax on corporations) by the Act of October 3, 1913 (38 Stat. 116-81, c 16) (the first income tax law), covering the years 1909 to 1915, inclusive, would be and were forever barred from assessment and collection. That result is made clear by the explicit provisions of the

last paragraph of Section 250 (*d*) of the Revenue Act of 1921, which reads:

> "If upon examination of a return made under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained; *Provided, That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing.*" (Italics ours.)

Any summary assessment made under any Act, prior to the Revenue Act of 1921, which was not barred by the five year period for collection prescribed in Section 250 (*d*), could of course be collected within such period prescribed, whether collection thereof, after assessment, had been delayed by a claim for remission or abatement, or such period for collection could be extended by a consent in writing signed by

the taxpayer and the Commissioner (250 (*d*), *supra*).

Congress knew that the assessment and collection of all taxes imposed by the Act of August 5, 1905, and the Act of October 3, 1913, were barred by the five year limitation prescribed in Section 250 (*d*) of the Revenue Act of 1921. Therefore, in prescribing the procedure to be thereafter followed by the Commissioner, as outlined in the last above quotation, subsequent examinations of the Commissioner were confined to returns made under the Revenue Act of 1916 (39 Stat. 756-77 c 463), the Revenue Act of 1917 (40 Stat. 300-38, c 63), the Revenue Act of 1918 (40 Stat. 1057-96 c 18) and the Revenue Act of 1921 (42 Stat. 227, 136).

Under the provisions of the Revenue Act of 1921, the right of the Commissioner to make summary assessments was taken away or specifically denied; and there was substituted therefor, the right to make a "jeopardy" assessment, if he believed that the *collection* of the amount due would be jeopardized by *delay* in making such collection.

The danger of collection which Congress must have had in mind, when it authorized the Commissioner to make an assessment, if the collection of the amount due was jeopardized, was not the danger of the expiration of the limitation on assessment, as provided in the first part of Section 250 (*d*), but the danger of collection because of *insolvency or departure of the taxpayer*. Such an assessment would have worked upon the taxpayer a hardship if collection be made; therefore, provision was made for the *stay* of such collection by the filing of a claim for remission or

abatement. Congress did not require that a bond for payment of such assessment be given, for the reason that the Commissioner's belief for the necessity of such assessment might develop to be erroneous, and it was left to his discretion or the discretion of the Collector as to whether security for payment should be demanded of the taxpayer.

The tax involved in the case at bar *was not assessed under the provisions of Section 250 (d) of the Revenue Act of 1921, and therefore, the claim for abatement did not stay collection as therein provided.* The claim for the abatement of that tax merely *delayed* collection of the assessment made *in 1920* under the Revenue Act of 1917, which was barred after the expiration of five years from the date the return was filed (*Bowers* vs. *New York and Albany Lighterage Company*, 273 U. S. 346).

Prior to the date of the passage of the Revenue Act of 1924, June 2, 1924 (43 Stat. 253 c 234), and the Revenue Act of 1926, February 26, 1926 (44 Stat. part 2, 9, c 27), the Commissioner of Internal Revenue had misconstrued and misapplied the limitation provisions contained in Section 250 (*d*) of the Revenue Act of 1921. He had proceeded upon the erroneous assumption that the limitation provision on collection barred only collection by suit in Court, and that where assessment was timely made, *collection by distraint proceeding could be made at any time.* That interpretation of the law was held to be erroneous in *Bowers* vs. *New York and Albany Lighterage Company* and *United States* vs. *Russell, supra.*

The Revenue Acts of 1924, 1926 and 1928 provide that where assessments are timely made, collection by distraint or suit in Court may be made at any time within six years after date of assessment. However, those Acts apply only to assesments made after the date of their passage, and assesaments made within the statutory period, the collection of which was not barred prior to the date of the passage of the Revenue Act of 1926.

Prior to the date of the passage of the Revenue Act of 1924, the Commissioner of Internal Revenue adopted the practice that in or about the month of February each year of making "wholesale" assessments of taxes which he designated as being "without compliance with Section 250 (*d*) of the Revenue Act of 1921". Just what "non-compliance with Section 250 (*d*) of the Revenue Act of 1921" meant, nobody seems to know. Presumably it was intended to mean that notice had not been given to taxpayer before such assessment was made. After such assessments were made, the Commissioner would invite the taxpayer to file a claim for abatement or remission as authorized by Section 3220 Revised Statutes. If such assessments were made because of the *imminence of the expiration of the bar on assessments,* no claim for abatement or remission, or bond to secure payment is authorized; but if they were made because of the fear of insolvency which *jeopardized* collection, a claim for abatement was authorized, which may or may not be accompanied by a bond for payment.

To sum up:

(1) Claims for abatement of assessments made *prior to the date of the passage of the Revenue Act of 1921* did not operate to *stay* collection, and any loss to the Government by reason of *delay* in collection which might have resulted, is due to the omission or neglect of officers of the Government, without any fault on the part of the taxpayer.

(2) Claims for abatement of assessments made without compliance with Section 250 (*d*) of the Revenue Act of 1921, made because of the immediate expiration of the period of limitation on assessment and collection of five years were not authorized, should not have been accepted, and did not *stay* or delay collection. Any loss to the Government due to a failure to collect in time is the result of the negligence of its own officials and not to anything done by taxpayers.

(3) Claims for abatement of assessments that were made with the idea of immediate collection of the tax because of its collection becoming "jeopardized" by reason of insolvency or some cause other than the expiration of the bar of the statute, were authorized by law, and operated to *stay* collection. If bond for the payment of the tax accompanied the claim, collection of the tax might have become barred, yet the penalty of the bond could be collected (*United States* vs. *John Barth Company*, 279 U. S. 370).

In a case of an assessment under conditions of (3) above, and a bond for payment did or did not accompany the claim, collection of the tax nevertheless became barred.

By Section 1106 (*a*) of the Revenue Act of 1926, *supra*, it is provided that the bar of the statute on collection does not only bar the remedy but extinguishes the liability of the tax. Therefore the imposition of all taxes, no matter by what Revenue Act imposed, which became barred from assessment and collection prior to the date of the repeal of 1106 (*a*) by Section 612 of the Revenue Act of 1928 (May 29, 1928) is completely extinguished.

By Section 611 of the Revenue Act of 1928, it is provided:

> "If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 611 of the Revenue Act of 1928, if within the power of Congress to provide for the collection of a tax whose imposition has been extinguished, without a specific reimposition thereof, may be applied only to the collection of a tax assessed under the conditions of (3) above, the immediate collection of which was *stayed* by the filing of a claim for abatement with or without bond. The assessment of such a tax could

be identified by proof in the possession of the Commissioner and when so identified, Section 611 of the Revenue Act of 1928 might be said to make a reimposition thereof and remove the bar on collection, if such collection be made within one year after May 29, 1928.

Section 611 of the Revenue Act of 1928 could not be made to apply to assessments made under conditions (1) and (2) above, because the claims for abatement thereof *were not authorized by law*, and under no circumstances could such claims be said to have *stayed* or delayed collection so as to identify the tax for reimposition after the original imposition is extinguished by the bar on collection.

The effect of Section 1106 (*a*) of the Revenue Act of 1926 is to repeal all prior Acts imposing taxes in cases where the assessment and collection of the taxes thus imposed had become barred by the statute of limitations applicable thereto. In *Meriwether* vs. *Garrett*, 102 U. S. 498 (26 L. Ed. 179), at page 514 (L. Ed. p. 205), the Court said:

> "A repeal of the law under which the tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provisions for its continuance is made in the repealing Act, though the tax may be revived and enforced by subsequent legislation."

There is no revivor of the tax in this case by subsequent legislation; Section 611 of the Revenue Act of 1928 may not be so construed. It must be limited to embrace only such tax, the jeopardy assessment of which was authorized by Section 250 (*d*) of the Reve-

nue Act of 1921. The tax in this case was not assessed under the provision of Section 250 (*d*) of the Revenue Act of 1921.

This is not a proper case for the Court to decide the question of whether a taxpayer has a vested right in the bar of the statute; that question may only be settled in a case arising under the conditions of (3) above, in which the tax sought to be collected or retained may be identified by proof by the Government as being a tax, the collection of which was *legally stayed* by the filing of a claim for abatement with or without bond.

There is in this case no imposition or levy of the alleged tax collected, and no provision of law to authorize the collection thereof. The collection being made without authority in law, it is erroneous, and the amount so collected should be refunded.

It is important to the general public that the Court so hold and decree in this case.

Respectfully,

ROBERT A. LITTLETON,
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ABRAHAM LOWENHAUPT,
STANLEY WAITE,
Amici Curiæ.